

STUDY GUIDE

Varian Medical Systems, Inc. v. Delfino S121400

This case will be argued before the California Supreme Court at a special session in San Diego on Tuesday, December 7, 2004, at 2:00 p.m.

Varian Medical Systems (Varian) fired an employee, Michelangelo Delfino. Delfino and another former Varian employee, Mary Day, posted on the Internet thousands of derogatory messages about Varian and several of its employees. Varian and some of its executives sued Delfino and Day for libel. Before trial, Delfino and Day unsuccessfully moved to terminate the suit under a statute that protects against lawsuits that attack a defendant's right of free speech about a public issue. The sole issue presented here is whether an appeal from an order denying such a special motion to terminate a suit automatically stops ("stays") everything in the superior court until the appeal is complete. Here, the trial court decided Varian's case was not stayed, and Varian and the executives obtained a judgment for \$775,000 against Delfino and Day.

This study guide explores some of the issues presented by this case. It is divided into four sections:

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I. Case Summary

Many people who have been fired from a job dream of taking revenge against the employer. Few people try. When Varian Medical Systems (Varian) fired Michelangelo Delfino, his friend Mary Day, quit her job at Varian, and the two began posting thousands of Internet messages making derogatory statements about Varian and personal attacks on several of its executives. Varian and the executives (collectively Varian) sued Delfino and Day for libel, which means publishing false written statements that damage a person's or business's reputation. Varian won a judgment in a jury trial against Delfino and Day for \$775,000.

Delfino and Day appealed the judgment and attacked it with many arguments, but the Court of Appeal affirmed the judgment. The two then sought review from the Supreme Court. The Supreme Court granted review, limited to one issue, whether Delfino and Day's earlier appeal from the order denying their motion to terminate (strike) the suit should have stopped (stayed) the case so the trial should never have taken place.

The First Amendment to the United States Constitution protects some of the most important personal, political, and religious rights of the American people. Among those rights are free speech, freedom of the press, and the right to work together (assembly) to affect government decisions. In the 1990's, the Legislature observed that some well-financed organizations were using lawsuits to scare people out of exercising their First Amendment rights. For example, some real estate developers were suing people who argued at city council and similar meetings that projects violated environmental laws or were unwise for other reasons. The businesses that filed these suits did not care whether they won—they just wanted to scare off opposition by the cost of defending suits. The Legislature gave such suits the clever name SLAPP, which stands for strategic lawsuit against public participation.

To protect people who exercise their First Amendment rights, the Legislature adopted a law called the anti-SLAPP law. That law allows a defendant who is sued for speaking out (individually or with an advocacy group) on a public issue to move to strike the complaint. If the defendant shows that the supposed wrongdoing alleged in the complaint involved First Amendment conduct related to a public issue, the plaintiff can only continue its suit if it can prove it will probably win. For example, a developer normally could not prove it would probably win if it sued a project protester for saying the project would increase traffic congestion because that is normally a reasonable opinion about most housing development projects. But a developer normally could prove it would probably win if it sued a protester for saying the developer's president was a convicted rapist because the

statement about a criminal conviction could be proved absolutely false. The Legislature made the denial of an anti-SLAPP motion one of the few orders that can be appealed before the final judgment in a case.

Here, Delfino and Day moved to strike Varian's complaint under the anti-SLAPP law. They claimed that their Internet comments about Varian were statements about a public issue. Varian argued that it is a company in business to make a profit, and neither its financial condition nor the personal lives of its employees is a public issue. Varian also argued that it would probably win because Delfino and Day published statements of supposed fact that were absolutely false, so the First Amendment did not protect those statements. The superior court agreed with Varian and denied the motion to strike the complaint.

Delfino and Day appealed. When they appealed, they argued in the superior court that all further proceedings leading toward trial were automatically stayed. They relied on a general appellate procedure statute, Code of Civil Procedure section 916, that provides proceedings are stayed to the extent they are "embraced" in or "affected" by the appealed issue. The superior court disagreed and allowed the case to proceed to trial.

Varian convinced the jury that Delfino and Day posted false factual statements that were not protected by the First Amendment. Varian received a judgment of \$775,000. The Court of Appeal, which had not decided the appeal from the order denying the anti-SLAPP motion, dismissed that appeal because it concluded all the pretrial proceedings were meaningless after the judgment.

Delfino and Day appealed from the judgment. Among other arguments, they contended the superior court had no power (sometimes called jurisdiction) to conduct a trial because their first appeal stayed all activity in the superior court. They lost on this issue in the Court of Appeal and petitioned for review. The Supreme Court agreed to decide only that issue.

Delfino and Day argue that an appeal from the denial of an anti-SLAPP motion must *always* result in a stay of all superior court proceedings. They say that is the specific intent of the Legislature. They argue this result is necessary so that the defendant does not have to spend money on attorney fees while the Court of Appeal decides whether the case should have been terminated.

Varian argues that the Legislature did not intend that all proceedings in the superior court be stayed every time an appeal is taken from the denial of an anti-SLAPP motion. Varian argues that the superior court should decide whether to stay the proceedings based on what is most fair to all parties under the specific circumstances of the case. Varian claims that Delfino and Day filed their motion

to strike, and appealed the ruling denying that motion, as a delay tactic and to aggravate Varian. Parties with such an improper motive should not, according to Varian, be rewarded with a stay of the superior court proceedings, and a significant delay of trial as a result.

II. Procedural Background

A. How did the case begin?

The case began as most do, with the filing of a complaint by the plaintiff, Varian. Delfino and Day first responded by trying to move the case to federal court. When a case involves rights created by the United States Constitution or federal statutes, a defendant can move it to federal court despite the plaintiff's choice to file the case in a state court. This is called removal, and it happens automatically when the defendant files certain papers in the state and federal courts. Delfino and Day filed removal papers. When a plaintiff thinks a case was not properly removed, it can ask the federal court to send it back to the state court. This is called remand, and it requires a formal motion to the federal judge. Varian successfully moved to remand the case. The removal and remand caused delay.

Over the course of time, Varian filed not only its original complaint, but also a first, second, and third amended complaint. Amended complaints are not unusual as the plaintiff obtains documentary evidence, interviews witnesses and chooses to expand, reduce, or fine-tune its case.

B. What is the motion to strike that Delfino and Day filed?

Delfino and Day filed a motion to strike Varian's third amended complaint under the anti-SLAPP law. They had not tried to strike either the original complaint or the first two amendments. They argued they were allowed to make the motion because a new right and time period to do so arise whenever an amended complaint is filed. Delfino and Day argued that the subject of their Internet postings—mostly Varian's financial condition and the integrity of some of its executives—was a public issue because Varian's stock is traded in the stock market and many members of the public own interests in Varian. Delfino and Day contended that Varian would not probably prevail. Varian opposed the motion vigorously on all possible grounds.

The superior court denied the anti-SLAPP motion to strike for three reasons. First, it concluded the motion was filed too late because the third amended complaint did not change the basic nature of the case. Second, it concluded Varian's complaint was not a SLAPP because it did not relate to the

defendants' right of free speech on a *public* issue. Third, it concluded that Varian had submitted enough evidence to show that it would probably prevail in showing that many of Delfino and Day's Internet postings were false, malicious, and damaging.

C. What happened when Delfino and Day asked for a stay?

Normally, a party cannot appeal a ruling by the superior court at the beginning or in the middle of a case. The party must wait until the case is over to appeal the final result (if the party lost) and then have the Court of Appeal review any part of the proceedings that caused it harm. The Legislature provides several exceptions to that rule, and a ruling on an anti-SLAPP motion to strike is one of them.

Delfino and Day appealed the denial of their anti-SLAPP motion. Then in the superior court they claimed that all proceedings were stayed. They relied on Code of Civil Procedure section 916, which is not part of the anti-SLAPP law but which applies to all appeals. That statute states that during an appeal in a civil case, matters are stayed in the superior court to the extent they are "embraced" in or "affected" by the order appealed. The statute's goal is to preserve the "status quo" -- in other words, to freeze things in their current condition so that the Court of Appeal can evaluate what happened and correct any error that was made. Delfino and Day asked the superior court to rule that the automatic stay was in effect during their appeal. Varian disagreed and opposed the stay. The superior court agreed with Varian; it ruled that there was no automatic stay and it refused to exercise discretion to stay proceedings.

D. What happened at trial?

Varian argued to the jury that Delfino and Day's statements were untruthful and harmful. According to Varian, the Internet postings were rude, false, malicious statements about Varian itself, and also about the personal lives of many Varian employees. Varian argued to the jury that the statements exceeded the bounds of what free speech allows. The jury believed Varian. It found Delfino and Day's Internet postings to be libel, and awarded Varian \$775,000.

The superior court then entered judgment against Delfino and Day based on the jury's findings. At that point, the Court of Appeal, which had not yet decided the appeal of the denial of the anti-SLAPP motion to strike, dismissed the appeal as "moot," meaning the appeal was meaningless. The Court of Appeal reasoned that the jury's verdict overcame any need for Varian to show it would probably prevail because Varian had actually prevailed.

E. How did the case get to the Supreme Court?

After the judgment was entered, Delfino and Day appealed it. This appeal did not challenge the denial of their anti-SLAPP motion. This appeal challenged the jury verdict and all decisions the superior court made during the case that Delfino and Day claimed were wrong. Delfino and Day argued that the superior court made many mistakes of law, and if the court had ruled correctly, the outcome of the trial probably would have been different. Delfino and Day also contended the superior court was wrong not to recognize that proceedings were automatically stayed during the anti-SLAPP appeal. They said the superior court was without "jurisdiction," or power, to conduct the trial, so the verdict and judgment were void. If the verdict and judgment are void, they must be vacated and the case sent back for a new trial, regardless of whether the jury was right.

The Court of Appeal affirmed the judgment. It specifically ruled that the anti-SLAPP appeal did not automatically stay the case in the superior court.

Delfino and Day petitioned for review to the Supreme Court. The Supreme Court granted the petition, but agreed to consider only the issue whether the anti-SLAPP appeal automatically stayed proceedings in the superior court. The parties have filed their briefs, and the case is now ready for oral argument.

III. Legal Issues

A. Legal arguments made by Delfino and Day

Delfino and Day make two main arguments.

Their first argument focuses on Code of Civil Procedure section 916, which defines when an appeal causes a stay of superior court proceedings. Any proceedings that are "embraced" in or "affected" by the subject of the appeal are stayed. Delfino and Day argue that the trial of a case is "affected" by the issue whether an anti-SLAPP motion to strike should have been granted. One aspect of an anti-SLAPP motion requires the plaintiff to produce evidence showing it will probably succeed at trial. Trial, Delfino and Day argue, is about whether the plaintiff will succeed. As a result, they claim, trial is always "embraced" in or "affected" by the issue whether the anti-SLAPP motion should have been granted. For that reason, Delfino and Day argue that *every time* a defendant appeals the denial of an anti-SLAPP motion, there is *always* a stay of superior court proceedings until the appeal is decided.

As part of this argument, Delfino and Day focus on the goal of the SLAPP statute. The goal is to provide defendants who were exercising their right of free speech on a public issue a way to defeat a lawsuit early, before they have to endure the time and expense of a trial. This result is needed, the Legislature stated in creating the SLAPP statute, to avoid a "chilling" of people's free speech. That is why the Legislature created a right of immediate appeal when the superior court denies an anti-SLAPP motion.

Delfino and Day argue that the Legislature's goal will be defeated if superior court proceedings are not automatically stayed during appeal of an anti-SLAPP motion. Defendants will be forced to go through all the steps in the superior court, including trial, yet the Court of Appeal may determine that the defendant never should have had to incur that expense, risk and inconvenience. They point to their own circumstances—they claim they are now virtually broke after having defended a trial against the multi-million-dollar corporation.

Delfino and Day's second argument introduces materials from the legislative history of the anti-SLAPP law. When the bill that allowed immediate appeals from anti-SLAPP rulings moved through the Legislature, several legislators commented on its the impact at committee hearings. They indicated that when an appeal is filed after the denial of an anti-SLAPP motion, it would automatically stay the superior court proceedings. Delfino and Day rely on well-recognized principles that when a court interprets a statute, its job is to determine and follow the intent of the Legislature, and when the intent is not clear from the language of the statute, the court should consider matters in the legislative record that illuminate the purpose of the law.

Delfino and Day ask the Supreme Court to reverse the judgment and send the case back to the superior court for a new trial because proceedings conducted during a stay are void.

B. Legal arguments made by Varian

Varian first disagrees with Delfino and Day that trial is "embraced" in or "affected" by the appeal of the anti-SLAPP motion. This is a technical argument that relies on the different standards of proof the plaintiff has in opposing an anti-SLAPP motion and at trial. In opposing an anti-SLAPP motion the plaintiff must simply offer some evidence that, if believed, would show the plaintiff will probably win. At trial, the plaintiff must actually win, based on the evidence the jury finds believable. Varian argues that because of the difference between the standards, trial is not "affected" by the appeal of the ruling on an anti-SLAPP motion.

Varian also addresses the legislative history issue. It argues the court should not consider statements made during the process of enacting the anti-SLAPP law because the stay would result from Code of Civil Procedure section 916, which the Legislature enacted many years earlier. Varian argues that comments made by legislators in 1999 about the scope of the stay during appeal do not show the intent of the legislators who drafted the statute defining the scope of the stay back in 1968. Varian argues that, had the Legislature intended there to be a stay every time an appeal was filed challenging the denial of an anti-SLAPP motion, the Legislature could have made that statement in the 1999 statute allowing for an immediate appeal.

Varian also argues that imposing a stay during every appeal of an anti-SLAPP order would cause too much unfairness. Varian begins with its own circumstances, contending that Delfino and Day used many meritless tactics, like the failed federal court removal, simply to delay trial, cause Varian expense, and annoy Varian. Varian says Delfino and Day's delaying tactics are exemplified by not making an anti-SLAPP motion until Varian filed the third amended complaint, more than a year after Varian filed the original complaint. Imposing an automatic stay on appeal would reward delaying tactics and deny prompt justice to plaintiffs with good cases. Here, Varian has proved its case to a judge and jury, and sending the case back for another trial would give Delfino and Day victory on what Varian calls a procedural technicality.

Varian requests that the Supreme Court rule that a superior court has discretion whether to impose a stay during appeal of an anti-SLAPP order. The superior court should impose a stay only when that is most fair to all parties, and the trial judge here found a stay was not fair. Varian wants the Supreme Court to affirm the judgment so that there will not be a new trial, and so Varian can enforce its judgment against Delfino and Day.

IV. Talking Points

1. The Legislature passed a law that protects everyone who exercises First Amendment rights. If Delfino and Day are correct that the anti-SLAPP law causes an automatic stay in every appeal from denial of a motion to strike, the anti-SLAPP law may cause an unjust result here. What is more important—protecting First Amendment rights for everyone or making sure that each lawsuit has a just outcome?

2. If the superior court had ruled there was an automatic stay, Varian could have asked the Court of Appeal to release the stay if Delfino and Day's appeal was clearly without merit or taken only to cause delay. In thinking about whether the

automatic stay applies, does it matter to you that the Court of Appeal can release it?

3. If a stay should apply only when staying proceedings is fair, who should decide what is fair? The superior court judge who denied the anti-SLAPP motion? The Court of Appeal that will decide the appeal? What does fair mean in this context?

4. Should the Supreme Court try to avoid the rule of strict voidness if this is a case of no harm, no foul? Does it matter whether Delfino and Day would have won or lost their appeal from the denial of their anti-SLAPP motion? If they would have lost, the only harm they suffered was acceleration of the trial. Does it matter that Varian won at trial? Does it matter that Delfino and Day may have used other tactics to cause delay?

5. What is a "procedural technicality"? If the Legislature intended for suits based on First Amendment free speech to be stopped in their tracks until both the superior court and the Court of Appeal found probable merit, is it a mere technicality for a citizen to seek shelter under that law? Does a good law become a procedural technicality when someone uses it for an unintended or abusive purpose?

6. If the Court of Appeal had found Delfino and Day's first appeal to lack any reasonably arguable merit or to have been pursued only for the purpose of delay, it could have made Delfino and Day pay all Varian's attorney fees and expenses for the appeal. Does that affect your opinion about whether the automatic stay should apply?

7. Should the law take posts to a chat room seriously? This case applied libel law as if Internet posts were identical to publishing the same statements in a newspaper. At one point, Delfino and Day said the Internet is like a world playground where you can shout anything you want and it does not mean anything. Does that make sense?

8. Must a court apply the law as the Legislature wrote it if the result in a particular case is unfair?

9. Is the financial condition of a private corporation a public matter if the corporation's stock is traded in the stock market and millions of members of the public own its stock?

10. How would you decide this case?